

In the Matter of Licenses No. 135919 and all other Licenses and Documents

Issued to: FRANK E. JOHNSON

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

882

FRANK E. JOHNSON

This appeal has been taken in accordance with Title 46 United States Code 239 (g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 3 February 1956, Examiner of the United States Coast Guard at Houston, Texas suspended License No. 135919 issued to Frank E. Johnson upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as Master on board the American SS RUTH LYKES under authority of the license above described, on or about 18 April 1955, while said vessel was in the port of Cebu, Cebu Island, Philippine Islands, he assaulted and battered the Junior Third Mate.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening statement. The Investigating officer introduced in evidence the testimony of the Junior Third Mate alleged to have been assaulted and the testimony of the Chief Mate who witnessed the incident.

In defense, Appellant offered in evidence his sworn testimony. Appellant stated that he went to the Junior Third Mate's room and reprimanded him for being asleep when he should have been on deck during the loading of cargo; the Junior Third Mate sat up and put his feet out as though trying to kick Appellant in the face while he was sitting in a chair; Appellant grabbed the Junior Third Mate's leg and he fell out of his bunk to the deck; Appellant wrestled with the Junior Third Mate when he tried to kick Appellant in the groin. Appellant repeatedly denied striking the Junior Third Mate or attempting to kick him as the Junior Third Mate had testified. Appellant admitted that he might have threatened the Junior Mate when he was on deck and tried to kick Appellant. The latter also testified that he did not observe any bruises on the

Junior Mate's face after this incident.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusion, the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the order suspending Appellant's License No. 135919, and all other licenses and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of six months.

Based upon my examination of the record submitted, I hereby make the following

#### FINDINGS OF FACT

On 18 April 1955, Appellant was serving as Master on board the American SS RUTH LYKES and acting under authority of his License No. 135919 while the ship was loading cargo at Cebu, Cebu Island, Philippine Islands. After lunch, the Junior Third Mate fell asleep in his bunk when he should have been on watch while the native stevedores were working on the ship. Appellant and the Chief Mate found the Junior Third Mate asleep when they returned from ashore about 1315. They entered his room. The Chief Mate stood by the door. Appellant sat in a chair facing the Junior Third Mate's bunk, at a distance of about five feet from the bunk, and called the Junior Third Mate. The latter awakened and set up with his back against the bulkhead on the far side of the bunk and his feet on the edge of the bunk.

Appellant reprimanded the Junior Third Mate for sleeping on watch and demanded an explanation. When the Junior Third Mate stated that he did not have any excuse, Appellant stood up, grabbed the Junior Third Mate by his legs and pulled until he fell from the bunk to the deck. A brief scuffle followed during which the Junior Third Mate attempted to kick Appellant while the Mate remained on the deck. The Junior Third Mate suffered a split tooth. Appellant was not injured. Appellant confined the Junior Third Mate to his room for the remainder of the day. The Chief Mate witnessed the entire incident but he did not participate.

There was no entry made in the ship's official Logbook with respect to the Junior Third Mate sleeping on watch or his injured tooth. The latter fact was entered in the medical log. The rough deck log was in the Junior Third Mate's room at the time of the incident. He made an entry in it to the effect that he had been assaulted by Appellant.

There is no record of prior disciplinary action having been taken against Appellant. He has been going to sea for

approximately 20 years.

This appeal has been taken from the order imposed by the Examiner. It is contended that the decision is contrary to the weight of the credible evidence which shows that Appellant took only such action as was reasonably necessary to protect himself when the Junior Third Mate attempted to kick Appellant while he was still seated and, again, after the Junior Third Mate fell to the deck.

It is also urged that the decision is not supported by reliable, probative and substantial evidence upon a consideration of the whole record. The testimony of Appellant is corroborated by that of the only disinterested eye-witness, the Chief Mate. Their excellent records show that both of these men are trustworthy and competent officers. Opposed to their testimony is that of the Junior Third Mate whose record shows that he is unreliable and irresponsible.

In conclusion, it is requested that the charge be dismissed or, alternatively, that the order be modified to an admonition.

APPEARANCES: Messrs. Royston and Rayzor of Houston, Texas by E. D. Vickery, Esquire, of Counsel

#### OPINION

After carefully reviewing the record in this case, it is my opinion that Appellant was guilty of assault and battery as alleged. Nevertheless, it seems apparent that the Junior Third Mate exaggerated the extent of the attack and his injuries.

The three witnesses agreed that the Junior Third Mate was sitting in his bunk with his back against the bulkhead (R. 11, 24, 39) and that he landed on the deck in a prone position (R. 4, 27, 40). With his back against the bulkhead, the Junior Third Mate could neither have come close to kicking Appellant in the face nor have fallen out of the bunk. It not only seems very improbable that the Junior Third Mate fell out of his bunk by throwing his entire body forward, as Appellant speculates in his brief, but there is no testimony that he took any such action. In fact, there is no testimony that the Junior Third Mate made any sudden motion with his feet which reasonably might have alarmed Appellant. Appellant testified that the Junior Third Mate "put his feet out" (R. 40) and the disinterested Chief Mate stated that Appellant was still sitting in the chair when the Junior Third Mate "raised his feet" (R. 27, 28). Appellant implied that he was still seated at this time. There is no attempt to refute the Junior Third Mate's testimony that the chair was five feet from the bunk.

Based on their observations quoted above, these two officers testified that , in their opinion, the Junior Third Mate was attempting to kick Appellant in the face. Under the circumstances, there was no logical basis for such an opinion. hence, Appellant was not justified in pushing the Junior Third Mate from the bunk to the deck as obviously must have occurred. Even the only disinterested witness, the Chief Mate, testified that Appellant pulled the Junior Third Mate out of his bunk (R. 27). It is not denied that one of the Junior Third Mate's teeth was split during this incident; nor that an entry of the treatment received was made in the ship's medical log.

For these reasons, I think that it must be concluded the weight of the evidence definitely establishes that Appellant was the aggressor. While the Junior Third Mate was lying on the deck, his attempt to ward off possible further attack by kicking at Appellant was an act in self-defense.

Although provocation is not a defense to assault and battery, it may be considered in mitigation. The provocation caused by the Junior Third Mate's inexcusable failure to stand his watch properly, which was aggravated by his prior acts of unreliability, will be considered in modifying the order to a probationary suspension. Other mitigating circumstances are Appellant's past good record and the minor nature of the assault and battery.

#### ORDER

The order of the Examiner dated at Houston, Texas on 3 February 1956 is modified to provide for a six (6) months suspension which shall not become effective provided no charge under R. S. 4450, amended (46 U.S.C. 239), is proved against Appellant for acts committed within twelve (12) months of the date when the Examiner's decision was served.

As so modified, said order is AFFIRMED.

A. C. Richmond  
Vice Admiral, U. S. Coast Guard  
Commandant

Dated at Washington, D. C., this 30th day of April, 1956.